BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE
NO. 02-466, JUDGE JOHN RENKE, III SC03-1846

TRIAL BRIEF ADDRESSING
AMENDED FORMAL CHARGE I

COMES NOW Respondent, **JUDGE JOHN RENKE, III**, by and through his undersigned counsel, and hereby files this, his Trial Brief Addressing Amended Formal Charge I, and states the following:

FACTS

1. Amended Formal Charge I references the statement "John Renke, a judge with our values" and contends that it purposefully misrepresents that he was a sitting judge.

2. The full content of the Exhibit A brochure indicates that John Renke was not a sitting judge, as it refers to his practice as an attorney and describes his law practice as a "general and family practice." It further points out that John Renke was appointed as an attorney in guardianship and incapacity proceedings, which is also inconsistent with any purported representation that he was a sitting judge.

3. John Renke, III, retained John T. Hebert, principal and owner of The Mallard Group, Inc., as his political consultant to discuss and devise election

strategies, including the effectiveness and appropriateness of campaign brochures and literature.

4. Based on Mr. Hebert's experience in evaluating voters' support of term limits, he believed that in many situations, the use of the word "re-elect" or the mention of incumbency is not necessarily a benefit, but rather a detriment. Mr. Hebert never counseled or recommended to John Renke to consider such a ploy as misrepresenting himself as an incumbent. Moreover, Mr. Hebert will confirm that John Renke, and his father, John Renke, II, did not suggest or infer that they should attempt to deceive or mislead anyone.

5. Mr. Hebert, who has been a campaign consultant for twenty years, did not believe that the cover headline did not imply or infer that John Renke was an incumbent judge, but rather the cover headline "John Renke – a judge with our values" was conceived merely to present to the voter a contrast that Mr. Renke's qualifications and experience were, in their opinion, more in line with their values than his opponent.

6. Mr. Hebert will confirm that other non-incumbent judicial candidates used similar language in their campaign brochures.

ARGUMENT

Special Counsel has the burden of proving any violations of the charged Judicial Canons by clear and convincing evidence. Florida courts define the term 'clear and convincing evidence' as follows:

> [T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

The JQC argues that the phrase "John Renke, a judge with our values" could be interpreted to suggest that John Renke was currently a sitting judge. The JQC must prove actual malice to establish that the statement, "a judge with our values," was false and thus, violative of Canon 7A(3)(a) and 7A(3)(d)(iii). Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002). To establish actual malice, the JQC must show that John Renke published the statement knowing it was false or that he seriously doubted the truth of the statement. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Fla. St. Jury Instr. (Civ.) 4.1. The evidence will establish that the judge never intended to convey the impression that he was an incumbent.

In considering whether a phrase is so misleading as to meet the actual malice standard, the entire context of the mailer must be considered. Dockery v. Florida Democratic Party, 799 So. 2d 291, 295 (Fla. 2d DCA 2001). In the full context of the mailer, the phrase is more consistent with the interpretation that Judge Renke would be "a judge with our values" once he was elected. For example, the mailer refers to his general and family practice and his appointment as an attorney in guardianship and incapacity proceedings. The text of the entire political circular represented John Renke III as an attorney and not as a sitting judge. The JQC cannot meet its burden by extracting one phrase from the mailer and arguing, that out of context, it misrepresents his status. Dockery at 295.

Moreover, depending on the perception of the reader, the statement is susceptible to different interpretations. In considering whether the judge made the statement knowing it to be false, or seriously doubting the truth of the statement, the Hearing Panel should consider other reasonable interpretations of the statement. Given the equal likelihood that the phrase is merely a description of the type of judge the candidate would become and not a suggestion that he is currently a sitting judge, there is a reasonable hypothesis of innocence precluding a guilty finding. See Florida Bar v. Marable, 645 So. 2d 438; Florida Bar v. Fredericks, 731 So. 2d 1249 (requiring The Florida Bar to prove that no reasonable hypothesis of innocence exists in order to establish the specific intent element for a violation

of a bar rule involving dishonesty, misrepresentation or deceit). The contrary interpretations preclude any finding that Judge Renke knowingly and purposefully misstated his position.

At worst, the statement is merely negligently misleading because the judge did not consider that the phrase could suggest incumbency. However, negligent misstatements do not meet for the "knowing misrepresentation" standard required by Canon 7. Moreover, negligent misstatements do not meet the "actual malice" standard necessary to prove a Canon 7A(3)(a) or 7A(3)(d)(iii) violation. Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Garrison v. State of Louisiana, 379 U.S. 64, 79 (1964). As such, the JQC cannot prove that Amended Formal Charge I violated Canon 7A(3)(a) and Canon 7A(3)(d)(iii).

The JQC cannot prove Amended Formal Charge I by clear and convincing evidence.

Respectfully submitted,

SCOTT K. TOZIAN, ESQUIRE
Florida Bar Number 253510
GWENDOLYN H. HINKLE, ESQUIRE
Florida Bar Number 83062
SMITH, TOZIAN & HINKLE, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
813-273-0063
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of September, 2005, the original of the foregoing Trial Brief Addressing Amended Formal Charge I has been furnished by electronic transmission via e-file@flcourts.org and furnished by FedEx overnight delivery to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and true and correct copies have been furnished by hand delivery to Judge James R. Wolf, Chairman, Hearing Panel, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; Marvin E. Barkin, Esquire, and Michael K. Green, Esquire, Special Counsel, 2700 Bank of America Plaza, 101 East Kennedy Boulevard, P. O. Box 1102, Tampa, Florida 33601-1102; Ms. Brooke S. Kennerly, Executive Director, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; John R. Beranek, Esquire, Counsel to the Hearing Panel, P.O. Box 391, Tallahassee, Florida 32302; and Thomas C. MacDonald, Jr., Esquire, General Counsel, Florida Judicial Qualifications Commission, 1904 Holly Lane, Tampa, Florida 33629.

_____

GWENDOLYN H. HINKLE, ESQUIRE